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No. 96-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ANHEUSER-BUSCH, INC. and
PENN ADVERTISING OF BALTIMORE, INC.,
Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; CITY COUNCIL OF BALTIMORE CITY; and DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* RONALD D. ROTUNDA AND JOHN E. NOWAK IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, Ronald D. Rotunda and John E. Nowak (collectively "*Amici*") respectfully move for leave to file the attached brief as *amici curiae* in support of petitioners. Counsel for petitioners has consented to the filing of this brief, and his letter of consent is filed with the Court. Counsel for respondents has declined to consent to the filing of the brief. *Amici*, therefore, submit this motion.

Amici are both professors of law at the University of Illinois, College of Law. They have published and lec-

tured widely on constitutional law subjects and have co-authored a treatise on Constitutional Law. They submit this motion and brief on their own behalf, and not as representatives of the University of Illinois. *Amici* have been compensated by the petitioners for the time spent in preparation of this brief, although they have not been compensated for their views of the First Amendment issues which are based on principles they have set forth previously in their Treatise.*

Amici believe that this case presents the Court with an opportunity to examine the meaning of, and justification for, the *Central Hudson* test as a standard to be used by federal and state courts when reviewing regulations of commercial speech under the First Amendment to the Constitution of the United States, as applicable to the States through the Fourteenth Amendment. *Amici* are presenting the Court with relevant material not already before the Court because they have taken a global, jurisprudential approach to how the Court can best clarify the applicable constitutional standards, as opposed to the partisan view presented by the parties.

Amici further believe that clarification of the standards to be applied under *Central Hudson* is necessary, if not essential, in light of the Fourth Circuit's serious misunderstanding of the level of judicial review accorded governmental restrictions on commercial speech. Were the Fourth Circuit majority's opinion to remain unchanged, *Amici* would have to amend the commercial speech section of their treatise on constitutional law to account for the unique approach taken by the Fourth Circuit and to attempt to reconcile the Fourth Circuit's departure from this Court's previous commercial speech decisions.

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* Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* (2d ed. 1992) (4 volumes with annual pocket parts). *See also* John E. Nowak & Ronald D. Rotunda, *Constitutional Law* (5th ed. 1995) (one volume hornbook of the four volume Treatise).

Ordinarily, *Amici* would wait until the Court granted the writ of certiorari before seeking to submit their brief. In this case, however, petitioners are seeking a summary reversal of the Fourth Circuit's judgment. Indeed, when this Court previously considered a petition for a writ of certiorari in this case, the Court did dispose of the cases summarily. *Anheuser-Busch, Inc. v. Schmoke,* 116 S. Ct. 1821 (1996) (petition granted, decision vacated, and cases remanded to the Fourth Circuit for reconsideration in light of *44 Liquormart v. Rhode Island,* 116 S. Ct. 1495 (1996)). It is possible, then, that *Amici* will not have an opportunity to present their views in support of a brief on the merits.

Because *Amici* offer a perspective different from any party on issues that are deserving of the Court's attention in this important case, *Amici's* brief will be of assistance to the Court. Accordingly, *Amici* respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI	1
STATEMENT	2
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE BALTIMORE AND MARYLAND STATUTES AT ISSUE IN THIS CASE AND THE DISTRICT COURT'S GRANTING OF THE GOVERNMENT'S MOTION TO DISMISS, MAKE THIS CASE A NEAR PERFECT VEHICLE FOR CLARIFICATION OF COMMERCIAL SPEECH ISSUES THAT PRESENT GREAT DIFFICULTY TO LOWER COURTS	4
II. A CASE DECIDED IN THE GOVERNMENT'S FAVOR BASED ON A PRE-TRIAL MOTION TO DISMISS IS THE BEST TYPE OF CASE FOR THE SUPREME COURT'S CLARIFICATION OF THE BURDEN OF PROOF IN COMMERCIAL SPEECH CASES	6
III. THE BALTIMORE ORDINANCE CLEARLY RAISES THE IMPORTANT ISSUE OF WHETHER A GOVERNMENT ENTITY MAY IMPOSE A GENERAL BAN ON TRUTHFUL ADVERTISING REGARDING A PRODUCT THAT IS LAWFUL FOR ADULTS, BUT NOT MINORS, TO USE; OR, ALTERNATIVELY, WHETHER A GOVERNMENT PROHIBITION OF COMMERCIAL SPEECH, WHICH THE GOVERNMENT ASSERTS IS DESIGNED TO PROTECT MINORS, MUST, AT LEAST TO SOME EXTENT, BE TAILORED TO RESTRICT ADVERTISING AIMED AT MINORS	10
CONCLUSION	14

TABLE OF AUTHORITIES

CASES: Page

Anheuser-Busch, Inc. v. Schmoke, 116 S. Ct. 1821 (1996) 8
Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989) 6
Butler v. Michigan, 352 U.S. 380 (1957) 10-11
Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980) .....*passim*
City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) 7
Cohen v. California, 403 U.S. 15 (1971) 11
Edenfield v. Fane, 507 U.S. 761 (1993) 7
44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996) 5, 13
Ginsberg v. New York, 390 U.S. 629 (1968) 10
Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977) 6-7
Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328 (1986) 8
Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995) 13
United States v. Edge Broadcasting Co., 509 U.S. 418 (1993) 7
Valley Broadcasting Co. v. United States, 1997 WL 76254 (9th Cir. Feb. 25, 1997) 9

OTHER AUTHORITIES:

Daniel A. Farber & John E. Nowak, *Justice Harlan and the First Amendment*, 2 Constitutional Commentary 425 (1985) 11
John E. Nowak & Ronald D. Rotunda, *Constitutional Law* §§ 18.6-18.31 (5th ed. 1995) 4
Ronald D. Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. Ill. L. Forum 1080 4
Ronald D. Rotunda, *Commercial Speech and the Platonic Ideal: Libre Expression et Libre Enterprise, in Freedom of Expression and the Charter* 319 (David Schneiderman ed., 1991) 11

TABLE OF AUTHORITIES—Continued

Page

Ronald D. Rotunda, *Professionalism, Legal Advertising, and Free Speech in the Wake of Florida Bar v. Went For It, Inc.*, 49 Ark. L. Rev. 703 (1997) 5

4 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* §§ 20.26-20.31 (2d ed. 1992 & 1997 Supp.) 4, 5, 6

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BRIEF OF *AMICI CURIAE* RONALD D. ROTUNDA AND JOHN E. NOWAK IN SUPPORT OF PETITIONERS

INTEREST OF AMICI

The interest of *amici curiae* Ronald D. Rotunda and John E. Nowak are set out fully in the Motion for Leave to File accompanying this brief.

STATEMENT

For many years this Court has granted First Amendment protection to what is often called "commercial speech." Both the state and federal governments have often accepted these decisions with extreme reluctance, as they have enacted new legislation that seeks to ban commercial speech to the fullest extent possible. In this case, the government seeks to prohibit truthful advertising about an admittedly lawful product, on a theory that has far-reaching implications. Can the government prohibit advertising directed to adults on the ground that it may be viewed by children? Does the state have the power to restrict the adult population to reading what is fit only for children? Equally significant is the issue whether the government has the power to keep truthful information from legal adult users of a product in order to manipulate their choices in the free market. If the government claims that its purpose of forbidding certain types of advertising is to keep people in the dark about the truth, that admission should spell the death knell for the restriction, not justify it.

This case presents the Supreme Court with the opportunity to resolve problems being faced by the lower courts in applying this Court's previous commercial speech decisions. Should the Court decide not to accept the case for full briefing and oral argument, the *amici* respectfully suggest that the Justices grant the alternative relief sought by petitioners, and summarily reverse the decisions of the United States Court of Appeals for the Fourth Circuit, and the District Court, so that the opinions of those courts cannot be used as precedent for the virtual elimination of First Amendment protection for commercial speech.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals in this case both demonstrates the need for clarification

of the standards to be used by the judiciary in commercial speech cases, and provides an excellent vehicle for Supreme Court clarification of those standards. Moreover, this case is a particularly suitable vehicle because it was decided on the basis of a government motion for dismissal, and thus is uncluttered with unique facts that might make any ruling less useful to the state and federal courts that must deal with these questions.

When reviewing governmental restrictions of "political" or "noncommercial" speech, the judiciary requires the government to bear the burden of demonstrating that the prohibited speech falls within a category of speech that the Supreme Court has held may be punished consistently with the First Amendment, or that the restriction is necessary [narrowly tailored] to promote a "compelling interest." However, decisions of the Supreme Court of the United States concerning "commercial speech" have left lower courts uncertain as to: (1) whether truthful commercial speech receives lesser First Amendment protection than "noncommercial speech"; (2) the nature of the government's burden of demonstrating that a prohibition of truthful commercial speech is narrowly tailored to promote an important interest; (3) whether all speech that is identified with a corporation or business entity that is known for selling a specific product is "commercial speech;" and (4) whether the government may prohibit adults from reading truthful, nonmisleading information, because children might incidentally see this information.

The decisions of the Court of Appeals in this case, one of which followed a Supreme Court order remanding the case for reconsideration, demonstrate the confusion concerning the issues noted above. The Court of Appeals' decisions, and the procedural posture of the case, present the following issues:

First, when prohibiting truthful speech about a lawful product, what is the nature and extent of the govern-

ment's burden to demonstrate that the prohibition is narrowly tailored to promote an important government interest? The Court of Appeals' most recent opinion in this case demonstrates the confusion on this point. The Court of Appeals appears to have reversed the constitutionally required burden of proof, by employing a presumption of constitutionality for the ordinance, and requiring the speaker/advertiser to prove that the prohibition was not tailored to promote an important interest.

Second, may the government prohibit truthful advertising that is not targeted toward children, on the basis of "protecting children" with a regulation that, on its face, is not designed to restrict advertising targeted toward children?

ARGUMENT

I. THE BALTIMORE AND MARYLAND STATUTES AT ISSUE IN THIS CASE AND THE DISTRICT COURT'S GRANTING OF THE GOVERNMENT'S MOTION TO DISMISS, MAKE THIS CASE A NEAR PERFECT VEHICLE FOR CLARIFICATION OF COMMERCIAL SPEECH ISSUES THAT PRESENT GREAT DIFFICULTY TO LOWER COURTS

The *amici* are not so presumptuous, or pretentious, that they would waste the Justices' time with a recitation of the Supreme Court's commercial speech cases. Our analysis of the Court's commercial speech decisions appears in 4 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional law: Substance and Procedure* §§ 20.26-20.31 (2d ed. 1992 & 1997 Supp.). *See also* John E. Nowak & Ronald D. Rotunda, *Constitutional Law* §§ 18.6-18.31 (5th ed. 1995) (one volume hornbook of the four volume Treatise); Ronald D. Rotunda, *The Commercial Speech Doctrine in the Supreme Court,* 1976 U. Ill. L. Forum 1080.[1]

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[1] This article was cited in *Central Hudson Gas & Electric Corporation v. Public Service Commission,* 447 U.S. 557, 575 (1980). For further discussion of these issues, *see also* Ronald D. Rotunda,

Since 1980 the judiciary, in reviewing the constitutionality of restrictions of commercial speech, has employed the four-part test set forth in Justice Powell's majority opinion in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 574 (1980). Some Justices have recently expressed doubts about the justification for, and the meaning of, the four-part test. *E.g.*, *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1515 (1996) (Scalia, J., concurring in part and in the judgment); 116 S. Ct. at 1515-16 (Thomas, J., concurring in part and in the judgment); *cf.* 116 S. Ct. at 1511-12 (Stevens, J., joined by Kennedy, Thomas, & Ginsburg, JJ.)

While any commercial speech case arising in the lower courts might provide the vehicle for reconsideration of the *Central Hudson* four-part test, the *Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore City* case presents a particularly good fact situation for examining the meaning of, and justification for, the *Central Hudson* test.

In practice the *Central Hudson* four-part test results in a two step analysis. "First, a Court must determine whether the speech is truthful, nonmisleading speech concerning a lawful product." 4 Rotunda & Nowak, *supra*, at 194. The government, in this case, has never claimed that petitioners' billboard advertising contains fraudulent or factually misleading statements. The government has not attempted to demonstrate that the petitioners' billboard advertisements constitute an offer to sell alcoholic beverages to persons under the age of 21 (*i.e.*, that they are directed to persons under the age of 21) whose use of such products is prohibited by Maryland and Baltimore law. The Maryland enabling statute and the Baltimore ordinance at issue in this case allow signs and billboard-type advertisements for alcoholic beverages on buses,

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Professionalism, Legal Advertising, and Free Speech in the Wake of Florida Bar v. Went For It, Inc., 49 Ark. L. Rev. 703 (1997).

which may travel by schools, the Baltimore sports stadiums, frequented by many persons under the age of 21, or at establishments selling products containing alcohol on their premises, even if the establishment, and its signs, are visible from the windows of grade schools in the City.

Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore City clearly presents only questions regarding what we have termed the second stage of commercial speech analysis. In the second stage of the analysis—after finding that the government regulation restricts non-misleading commercial speech concerning a lawful product—a court must determine whether the regulation at issue is narrowly tailored to directly advance a substantial government interest. As explained in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 477-81 (1989), the regulation must be narrowly tailored to promote the asserted governmental interest, in the sense that there must be at least a "reasonable fit" between restricted commercial speech and the government's asserted substantial interest. 4 Rotunda & Nowak, *supra*, at 194-96. This "reasonable fit" analysis does not involve a presumption of constitutionality for laws regulating truthful commercial speech, as does the rationality/reasonableness test used by the Supreme Court to review economic and social welfare legislation under the due process and equal protection clauses.

II. A CASE DECIDED IN THE GOVERNMENT'S FAVOR BASED ON A PRE-TRIAL MOTION TO DISMISS IS THE BEST TYPE OF CASE FOR THE SUPREME COURT'S CLARIFICATION OF THE BURDEN OF PROOF IN COMMERCIAL SPEECH CASES

Both before and after the *Central Hudson* case, almost all of the decisions of the Supreme Court concerning commercial speech indicate that the government must demonstrate to the court that there is a factual basis for finding the "reasonable fit" between the type of commercial

speech prohibited or restricted by the statute and the government's substantial interest. For example, in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 95 (1977) (footnote omitted). Justice Marshall's opinion for an unanimous Court stated: "The record here demonstrates that respondents [the government] failed to establish that this ordinance [banning residential "for Sale" signs] is needed to assure that Willingboro remains an integrated Community [the government's asserted interest]."

Similarly, in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993) (citations & footnotes omitted), Justice Stevens' majority opinion stated: "It was, therefore, proper for the District Court and the Court of Appeals to judge the validity of the city's prohibition [of newsracks for commercial handbills] under the standard we set forth in *Central Hudson* and *Fox*. It was the city's burden to establish a 'reasonable fit' between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of newsracks as the means chosen to serve those interests."

The District Court's opinion in *Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore City*, set forth as appendix D to the petitioners' petition for a writ of certiorari, reads the Supreme Court's decisions in *Edenfield v. Fane*, 507 U.S. 761 (1993) and *United States v. Edge Broadcasting*, 509 U.S. 418 (1993), as affirming "the role of judicial deference to legislative judgments in the area of commercial speech." [2]

The first opinion of United States Court of Appeals, affirming the District Court decision,[3] stated that a governmental entity would meet its burden in justifying a prohibition of commercial speech "[i]f it appears to the

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[2] This passage appears on page 47a of the petition.

[3] Set forth as appendix C to the petition.

court that the legislative body could reasonably have believed, based on data, studies, history, or common sense" that the law promoted a legitimate interest.[4] Because the District Court had decided the case without the parties having the opportunity to present evidence at trial, the Court of Appeals was, in reality, absolving the government from having to demonstrate the reasonable fit required by *Central Hudson, Linmark,* and *Discovery Network.* The Supreme Court then remanded this case to the Court of Appeals for reconsideration in light of *44 Liquormart, Inc. v. Rhode Island. Anheuser-Busch, Inc. v. Schmoke,* 116 S. Ct. 1821 (1996).

The final opinion of the Court of Appeals is set forth in Appendix A to the Petition. The Court of Appeals' majority opinion shows the difficulty that lower courts face when trying to reconcile the statements in most of the Supreme Court's commercial speech cases, which place the burden of proof on the government, with the statements in a few cases, such as *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986), which can be read as granting great deference to a legislative decision to ban truthful commercial speech. In footnote "*" of the majority opinion, the Court of Appeals states "we do not continue to rely on *Posadas* . . . we do not defer blindly to the legislative rationale, but rather agree with it based on our independent conclusion. . . ."[5] Despite that passage, the Court of Appeals, by a two to one vote, decided that it should once again affirm the District Court's ruling despite the fact that there had been no trial, or other hearing, at which the government was required to produce facts to support its conclusion. At a trial or hearing at which the government bore the burden of demonstrating a reasonable fit between its asserted interest in protecting minors and its regulations, the petitioners could have brought to the trial court's attention

[4] This passage appears on page 25a of the petition.

[5] This passage appears on page 3a of the petition.

the fact that the government provided no data to support its particular law—the government only offered references to studies showing a general correlation between advertising and consumption [a point we will address in Part III, *infra*.].

The difficulty the lower courts are currently having in explaining the nature of the government's burden of proof in commercial speech cases can be demonstrated by contrasting the decision of the Fourth Circuit, in the present case, with the decision of the Ninth Circuit in *Valley Broadcasting Co. v. United States*, 1997 WL 76254 (9th Cir. Feb. 25, 1997). In *Valley Broadcasting*, the Ninth Circuit took the position that the Supreme Court's decisions required the government to prove that a prohibition of truthful commercial advertisements for casino gambling directly promoted the asserted governmental interests. The panel of the Fourth Circuit, in the present litigation, took the position that the government met its burden to justify a prohibition of truthful commercial speech, without presenting evidence, and without a trial, as long as the court found that there was a reasonable argument in support of the challenged law. The standard employed by the Fourth Circuit appears to be the "minimum scrutiny" standard used for the judicial review of economic and social welfare legislation under the due process and equal protection clauses. In contrast, the Ninth Circuit understood this Court's First Amendment decisions to require the government to present facts at trial that would prove that its commercial speech prohibition met all prongs of the *Central Hudson* four-part test.

The granting of the petition for a writ of certiorari in the present case will give the Supreme Court the opportunity to clarify the government's burden of proof in justifying a prohibition of commercial speech without the danger of having its explanation of the standard complicated by, or "tied up with," unique facts that would be demonstrated at a trial. The Court can use this case to

explore the nature of the government's burden to justify prohibitions of commercial speech, and to consider what if any deference should be given to laws regulating commercial speech. The case could then be remanded to the Court of Appeals, and District Court, for reconsideration in light of the clarified standard. Assuming the lower court properly applied the clarified standard, there should then be no need for the Supreme Court to review this particular case again.

III. THE BALTIMORE ORDINANCE CLEARLY RAISES THE IMPORTANT ISSUE OF WHETHER A GOVERNMENT ENTITY MAY IMPOSE A GENERAL BAN ON TRUTHFUL ADVERTISING REGARDING A PRODUCT THAT IS LAWFUL FOR ADULTS, BUT NOT MINORS, TO USE; OR, ALTERNATIVELY, WHETHER A GOVERNMENT PROHIBITION OF COMMERCIAL SPEECH, WHICH THE GOVERNMENT ASSERTS IS DESIGNED TO PROTECT MINORS, MUST, AT LEAST TO SOME EXTENT, BE TAILORED TO RESTRICT ADVERTISING AIMED AT MINORS

The present case provides an excellent vehicle for Supreme Court consideration of the interplay between the government's power to protect children and its power, consistent with the First Amendment, to restrict advertising to adult consumers. At the present time the lower courts have no guidance from the Supreme Court regarding how to analyze a government ban on advertising of products that are lawful for use by adults only. In the area of obscenity and pornography the Supreme Court has given guidance to the lower courts regarding the scope of governmental power to protect minors. A government entity may prohibit the distribution, sale, or showing of sexually explicit material to children that is unfit for minors to see, under defined community standards, even though the material is not obscene and, therefore, could not be totally banned. *Ginsberg v. New York*, 390 U.S. 629 (1968). Nevertheless, the government may not

prohibit a book store from stocking any book that is unfit for minors (but not adults), because that ban would violate the First Amendment by its restriction of the availability to adults of sexually related, but non-obscene, books and magazines. *Butler v. Michigan*, 352 U.S. 380 (1957) (holding that Michigan violated free speech when it reduced the adult population to reading what is fit only for children).[6]

The *amici* have long agreed with the second Justice Harlan that some, if not all, First Amendment cases can be best analyzed by first eliminating some topics that are not at issue in the case. *See, e.g., Cohen v. California*, 403 U.S. 15, 18 (1971); Daniel A. Farber & John E. Nowak, *Justice Harlan and the First Amendment*, 2 Constitutional Commentary 425 (1985). *Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore City* is an important case because it does not involve advertising aimed at minors. Whether a governmental entity could prohibit corporations selling products containing alcohol, which is lawful for adults, but not minors to use, from using cartoon characters in their ads may be an interesting question, but it is not involved in this case. Neither Baltimore, nor Maryland [which enacted the enabling statute authorizing the Baltimore ordinance] has claimed that the banned billboard advertisements for alcohol related products are targeted at minors, because such a claim would be patently false.

The ordinance, and the state statute that authorizes it, have literally no relationship to reducing alcohol consumption other than the assertion that a reduction in the total volume of alcohol related advertising will [for reasons unexplained, as well as unproven] reduce illegal alcohol use by minors. The Baltimore Ordinance does not prohibit all signs advertising alcohol products. The

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[6] *See* Ronald D. Rotunda, *Commercial Speech and the Platonic Ideal: Libre Expression et Libre Enterprise, in, Freedom of Expression and the Charter* 319 (David Schneiderman ed., 1991).

ordinance exempts a wide variety of such advertising. *Among the many exemptions from the ban are*: advertisements on commercial vehicles that transport products containing alcohol; "any sign"—other than billboards—"for which zoning Board approval . . . is required;" "any sign on an MTA vehicle or taxicab;" "any sign on property owned, leased or operated by the Maryland Stadium Authority" or "any sign at Memorial Stadium." The exempted signs are as likely, or more likely, to be seen by children than are the signs referring to alcohol that are prohibited by the ordinance. Children can look out their school windows at advertisements for products containing alcohol on buses, taxis, and trucks that make the products containing alcohol products attractive. Children, under the Baltimore ordinance, can be exposed to any number of advertisements for products containing alcohol at the baseball stadium in Baltimore, and in signs at places where products containing alcohol are sold, but petitioners are banned from having signs that have not been designed to promote sales to children in any way.

The government offered only its mere assertion that reduction in advertising will reduce consumption by a particular group of people. The city's limitations on advertising may well *increase* alcohol consumption, by making alcohol into a "forbidden fruit." For example, marijuana and cocaine are not advertised, and yet high school (and even grade school) students have no problem buying these illegal substances. If the city believes that advertising is so powerful (notwithstanding famous examples to the contrary, such as the inability of advertising to sell the Edsel), then the city could engage in advertising itself. Thus, the city could broadcast advertisements about the dangers of alcohol consumption, especially by the young. Rather than seeking to silence truthful speech about a lawful product, the city could exercise its right to engage in free speech. We should never forget that the normal response to speech that one does not like is *more speech, not less.*

Moreover, if the city is really concerned about alcohol consumption, there are non-speech ways to reduce alcohol consumption by those underage. Federal rules now require sellers of tobacco to ask for identification if the purchaser looks younger than 27 years of age. The city could impose similar rules on the sale of alcohol. Such rules would be more narrowly tailored than the present assault on free speech.

The theory that restrictions on truthful advertising of lawful products are permissible if they are effective in manipulating the adults who purchase the products is contrary to the central principle of democracy. The theory that the government can prohibit adults from reading truthful advertising because children might also see it is a theory so broad that it swallows up virtually all protection for commercial speech. The ruling of the Court of Appeals presents the real danger that expressions of concern about the illegal use of alcohol by minors [or any other product that is lawful for adults, but not for minors to purchase] can justify a total ban on truthful advertising of lawful products.

The Baltimore and Maryland laws are no more tailored to the prevention of the use of alcohol by minors than were the statutes that were stricken by the Supreme Court in *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995) and *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495.[7] Both the Federal Government, in *Rubin*, and the Rhode Island Government, in *44 Liquormart*, could have made the same assertion as Baltimore, which in essence is: "if we ban all, or at least a lot of, ads for products containing alcohol, kids won't use alcohol illegally." The lower courts need to learn from the Supreme Court whether

[7] Indeed, the Baltimore ordinance is so poorly drafted that, on its face, it may ban signs with public service announcements because they carry the name of a business entity that is identified with the production and sale of products containing alcohol.

that assertion is, or is not, in itself enough to save such laws. Granting the petition for certiorari in *Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore City* will allow the Supreme Court to provide needed guidance on this issue to legislatures considering restricting advertising of lawful products that may be harmful if used by children, and to the courts that will have to review the constitutionality of such laws.

CONCLUSION

For the reasons stated above, the *amici* respectfully submit that the Supreme Court should grant a writ of certiorari in *Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore City*.

If the Justices do not believe that this case should be fully briefed and argued in the Supreme Court, the *amici* respectfully request the Supreme Court to grant petitioners' alternative request for relief by summarily reversing the decisions of the United States Court of Appeals for the Fourth Circuit and the District Court. If the decisions of those courts are not reversed, or reviewed by the Supreme Court, lower courts throughout the nation may believe that they should follow the lead of the Fourth Circuit and refuse to engage in meaningful review of laws prohibiting commercial speech.

Respectfully submitted,

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